Supreme Court, U.S.
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NO. 96-942

In The
Supreme Court Of The United States

October Term, 1996

FIRST SECURITY BANK, et al.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FIRST VIRGINIA BANK-SOUTHWEST, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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RESPONSE TO FDIC'S QUESTION PRESENTED

The Petition for Certiorari (hereafter "Petition") presented three questions for review. In its Brief in Opposition (hereafter "Opposition"), FDIC attempts to circumvent these questions by recasting them into one which is both confusing and misleading. FDIC's single, consolidated question completely ignores, inter alia, Petitioners' first and third questions.

FDIC's consolidated question does not encompass Petitioners' first issue as to whether the trial court erred in interpreting 12 U.S.C. §1821(d)(2)(A)(i) (hereafter "§1821(d)") as granting FDIC exclusive, expansive priority and authority over the derivative and nonderivative claims of shareholders of a defunct bank against third parties. FDIC further does not encompass/ answer Petitioners' third issue in that, contrary to FDIC's inference in its question presented, shareholder-Petitioners did fully comply with "the district court's directive that they state with specificity their asserted (nonderivative) interest in the litigation." However, whether shareholder-Petitioners did or did not comply with the district court's directive has absolutely nothing to do with Petitioner-Anthony's right to intervene. That is, the district court's directive in no way applied to Anthony, inter alia, because he was not a party to the underlying action when the court entered its directive. Since FDIC's single question presented applies solely to shareholder-Petitioners, who it alleges did not comply with the trial court's directive, FDIC must be conceding that Anthony's right to intervene was inappropriately denied.

Since the district court's 'directive' Order applied solely to Petitioners' nonderivative claims (Pet.App. A6-A7), Petitioners' two derivative motions to intervene–one filed before the 'directive' Order was entered and the other filed afterwards–should have been, but were not, evaluated under the established standards of F.R.C.P., Rule 24. The district court's expansive interpretation of §1821(d) should not have prevented Petitioners from intervening to monitor their derivative and nonderivative claims, especially where FDIC had an acknowledged conflict and dilemma with prosecuting this action. FDIC's consolidated question does not address this error by the trial court.

FDIC's consolidated question contains the parenthetical phrase "when petitioners failed to comply with the district court's directive that they state with specificity their asserted (nonderivative) interest in the litigation." As noted in the Petition, FDIC's Opposition, and herein, however, the only district court directive was as to the original shareholder-Petitioners and their direct, nonderivative claims (hereafter "nonderivative claims"). Accordingly, FDIC is now inferring that the only valid legal reason which it can proffer for the district court's denial of all the multiple motions to intervene by the multiple Petitioners is the alleged non-compliance with the court's directive as to the nonderivative claims. Under FDIC's own argument, then, Petitioners' second question presented for review must be answered in the affirmative because it concerns only the derivative claims.

FDIC's consolidated question does not address Petitioners' Questions Presented and, by glossing over distinctions and misdirecting the focus, essentially admits that all motions to intervene should have been granted related to shareholder-Petitioners' derivative claims and Anthony's derivative and nonderivative claims. Further, FDIC does not argue that Petitioners' Questions Presented for Review are inappropriate. FDIC apparently merely rolled Petitioners' three questions for review into one issue in order to confuse the legitimate issues raised by Petitioners and in order to more easily camouflage the defects of FDIC's own positions.

RESPONSE TO FDIC'S STATEMENT OF FACTS

FDIC's "Statement" of the facts (Opp. 2-6) is a masterful illusion which sets forth certain alleged facts and procedural matters which are either false or extremely misleading and which adds interpretations which are not contained in the record of this case--likely the result of their current counsel's not participating in the trial court proceedings or "the heavy press of earlier assigned cases to attorneys handling this matter" (FDIC's request for more time to file Opposition). Nonetheless, whether intentional or inadvertent, the statements might easily mislead this Court as to the record facts and the procedures in the trial court. Thus, Petitioners will address herein a few of those false and/or misleading statements which are material and obvious.

First, the statement (Opp. 2) that "[t]he plaintiffs retained ...Anthony as counsel to pursue the case on a contingency-fee basis" is misleading and completely ignores the material fact that Anthony also owns an outright 30% interest in all the derivative and nonderivative claims alleged in the Complaint. This uncontroverted fact is evidenced in the record, inter alia, by several sworn affidavits, including one from the CEO and Chairman of the Board of First Security. Thus, it is entirely misleading for FDIC to infer that Anthony's sole interest in this litigation is in the nature of a 'typical' contingency-fee.

Second, FDIC alleges (Opp. 2) that "[o]n May 30, 1991, the FDIC notified Anthony that all of First Security's putative creditors were required to file their claims with FDIC by August 28, 1991." This statement is false. A 'notice' was, in fact, sent to Stott & Anthony, P.C., a corporation that owned no interest in the causes of action; but Anthony received no such notice. Further, Anthony informed FDIC and its then counsel of his claim, and counsel for FDIC informed Anthony orally and in writing that the extent of his claim would have to be determined at a later date. This uncontroverted fact is supported in the record by both documentary evidence and affidavits. This false statement is misleading because it incorrectly infers that Anthony is required to submit his claim for an outright ownership of 30% of the cause of action and his claim on any recovery from a third party (i.e., someone other than FDIC) to FDIC.

Third, FDIC states (Opp. 2) that "[o]n August 15, 1991, the FDIC formally terminated Anthony's representation of First Security...." However, Anthony was not terminated in 1991, and the record below shows that he was not. Anthony, the original counsel of record, prepared and filed the Complaint, and no other person or entity filed any document to represent any plaintiff until July 31, 1992, when FDIC entered an appearance. It is absurd for FDIC to maintain now that Anthony's services were terminated on August 15, 1991, but that it decided not to enter an appearance until July 31, 1992, some eleven months later.

Fourth, FDIC alleges (Opp. 3) that "Anthony...refused to acknowledge that he had been terminated...." Anthony, however, could not "acknowledge" that he was terminated until he knew it.

The record below is documented with tangible evidence, including uncontroverted affidavits, proving that FDIC continuously and uninterruptedly used Anthony and/or his law firm after the alleged termination on August 15, 1991. Further, FDIC paid for the services so rendered.

Fifth, FDIC also states (Opp. 3) that "...none of the counts in the Complaint set [sic] forth a claim of direct injury to any of First Security's shareholders or directors...." After extensive briefing and oral argument, however, it was found that the Complaint did allege nonderivative claims, and an order (Pet.App. A-2) drafted by FDIC provided that "...Anthony...shall remain as counsel of record to the following individual plaintiffs, in their individual capacity for nonderivative claims...." Contrary to FDIC's current "argument" (Opp. 3-4), anyone reading the briefs submitted to the original trial court or the transcript of the hearing would know that it had been determined from the record and the Complaint that the Complaint did allege nonderivative claims.

Finally, Petitioners note that the Opposition is filled with deceptive statements and arguments. A fairly clear example is the statement (Opp. 5-6) that "[i]n its order (of December 13, 1993), the court observed that the Complaint stated no claims on behalf of First Security's shareholders and directors that were distinct from First Security's own claims." That Order, however, says absolutely nothing about whether "the complaint stated... claims on behalf of First Security's shareholders and directors." In fact, no order entered by any court herein has ever ruled that the Complaint did not allege nonderivative claims on behalf of shareholder-Petitioners. The court did "observe" and/or rule that the Complaint alleged nonderivative claims, stating that Anthony "shall remain" to represent those interests. When Petitioners repeatedly challenged defendants below and FDIC to produce any order ruling that the Complaint alleged no nonderivative claims, they ultimately admitted that no such order existed.

Solely for the purpose of dramatizing the difficulty for counsel not involved in the underlying, complex action to accurately state the facts in an appellate brief, Petitioners note that the motion to intervene filed by Anthony on July 1, 1994, was the

third one--not the 'second' as noted by FDIC (Opp. 5). However, space limitation does not allow for further detailing of false, incorrect, and/or misleading statements/arguments contained in FDIC's Opposition. Suffice it to say that there are many, many more which are likely the result of FDIC's having its Opposition drafted by counsel who had not participated in the district court proceedings.

RESPONSE TO FDIC'S ARGUMENT

In its Opposition, FDIC seeks to block review in this Court (1) by masking the clear conflict among the circuits on Petitioners' three questions, (2) by misstating the trial court record, (3) by falsely characterizing the orders and procedures below, and (4) by inappropriately attempting to consolidate and re-characterize Petitioners' meritorious questions for review.

1. FDIC begins its first argument with the false statement that Petitioners' "initial motion to intervene (was) to assert the shareholders' and directors' 'nonderivative claims.'" Filed on August 24, 1993, Petitioners' initial motion to intervene concerned only Petitioners' right to intervene as to their derivative claims. (JApp. C.A. 121-145). The penultimate sentence in FDIC's first argument also contains the false/misleading statement that "[t]he district court did not deny petitioners' motion to intervene out of a mistaken belief that individual shareholders and directors can never assert nonderivative claims against a receivership...." To the contrary, substituted Judge Kiser would never review the Complaint for nonderivative claims due to his mistaken belief, and this mistaken belief continued after he was repeatedly informed that his predecessor had already summarily determined that the Complaint did allege nonderivative claims. Without reviewing the Complaint for nonderivative claims, Judge Kiser mistakenly believed, based upon FDIC's "sacred cow" arguments at the time, that no director or shareholder of a defunct bank could simultaneously pursue a claim with FDIC. Thus, Judge Kiser cancelled the previously scheduled evidentiary hearing on Petitioners' derivative and nonderivative motion to intervene. For that same reason, an Order was never entered ruling that the Complaint did not allege nonderivative claims.

Contrary to FDIC's assertion now (Opp. 7), Petitioners do not disagree "with the district court's conclusion respecting the sufficiency of their pleadings." The district court never made a "conclusion respecting the sufficiency of [the] pleadings" because it could not get past its mistaken beliefs. The interpretation attributed by FDIC to Judge Kiser's June 9, 1994, Order (Pet. App. A-8) is not logical in view of the fact that the motion being denied was both a derivative and a nonderivative request by Petitioners to intervene. No person could read this particular motion to intervene as not "stat(ing) with specificity (the) nonderivative claims" which Anthony proposed to represent. Further, Judge Kiser also entered an Order on August 15, 1994 (Pet. App. A-11), providing that Anthony's pro se motion to intervene could "rise no higher than the [shareholder-Petitioners'] motion to intervene," clearly evidencing his mistaken belief as to FDIC's "sacred" position. Under these circumstances, the Court's mistaken belief as to the law should be reviewed by this Court.

2. FDIC's present counsel, not being involved in the trial court proceedings, entirely misunderstands the nomenclature of "derivative claims" employed by the trial court and then counsel for FDIC. After FDIC belatedly decided to get involved in this action with its acknowledged conflict, its then counsel initially used the phrase "derivative claims" to refer to the claims/rights to which FDIC succeeded by operation of law as an assignee, pursuant to §1821(d). In fact, the first order entered by the trial court employing the phrase "derivative" and "nonderivative claims" was entirely drafted by FDIC and entered over the strenuous objections of Petitioners. Accordingly, whether the underlying action was a class action under Rule 23 or a derivative action by shareholders under Rule 23.1 was never an issue for the trial court. As the trial court observed, the issue for it to decide was whether FDIC had an absolute right (even with its acknowledged conflict) to prosecute all in-court actions alleged in the Complaint merely because FDIC succeeded, as assignee, to the claims of First Security (ultimately determined by the record to be 70% of the "derivative" claims). Petitioners argue that even though FDIC, succeeded to the title of certain assets/claims of First Security, FDIC's acknowledged conflict prevented it from having the absolute right to solely represent in court those causes of action alleged--especially when the Complaint alleged damages which, if

recovered, would create a huge surplus in the Receivership Estate. To the contrary, FDIC argued that, even with its limited interests and its conflicts, it had absolute priority over the recovery related to all causes of action and an absolute right to solely prosecute this action. The trial court incorrectly agreed.

After Board approval, First Security and a group of its shareholders/directors filed this Complaint. This was before FDIC was appointed receiver and, as assignee, stepped into the shoes of the board of the defunct bank. Accordingly, the board of First Security had authorized and approved the filing of the action, whether a derivative action or not, before FDIC became title holder of any assets of the defunct bank. The day that FDIC was appointed receiver, by operation of state (i.e., Virginia Code §6.1-104) and Federal (i.e., §1821(d)) law, FDIC became the assignee of all assets/claims owned by its assignor, First Security. Contrary to FDIC's argument, an assignor cannot assign away more than it owns, nor take back an authorization (e.g., the consent to this action by shareholder-Petitioners) previously given. The real issue was not whether shareholder-Petitioners had to make additional Rule 23.1 demands of assignee-FDIC, but whether shareholder-Petitioners could remain and/or intervene in light of §1821(d). Anthony owned, absolutely and outright, 30% of all causes of action as of the date the Complaint was filed. Surely, FDIC would concede that Anthony was not required to make some further demand.

Contrary to FDIC's assertion in the penultimate sentence of section 2 (Opp. 7), Petitioners "had...occasion to make" and did make repeated demands upon FDIC, inter alia, to legitimately get involved in this case and then to allow them to prosecute the action, all to no avail. The record is voluminous regarding these demands, which are supported, inter alia, with uncontroverted affidavits. All Petitioners, including Anthony, were authorized to bring, inter alia, this derivative action and had standing to pursue these derivative claims, especially in light of FDIC's conflict and the potential huge surplus in the Receivership Estate resulting from a recovery from a third party.

Supporting Petitioners' position that the lower courts erred in permitting substitution of FDIC as the sole plaintiff with respect

to the derivative claims, Petitioners point out that FDIC's Opposition did not cite, differentiate, or respond to the five cases cited (Pet. 16-18) by Petitioners, concluding, inter alia, that §1821(d) does not divest a failed bank's shareholders of the right to assert a derivative action on behalf of the bank, especially when the cause of action could render an FDIC-Receivership Estate solvent. However, the instant case is even more compelling for shareholder-plaintiffs to pursue their own derivative claims because the record facts, without contradiction, prove conclusively that FDIC could not adequately represent Petitioners' interests in this litigation when FDIC and its counsel admitted their conflict in pursuing this mammoth action against a non-defunct FDIC-member bank. Symbolic of FDIC's demagoguery is its initial argument (Opp. 3 & 7) that the claims to which it succeeds as assignee are not really "derivative claims," then arguing thereafter that Petitioners were required to make a 'derivative demand' as if the claims were in fact derivative. Of course, it can not be both ways. In any event, the record is replete with uncontroverted evidence of prior approval by the Board of First Security and repeated unsuccessful demands upon FDIC to properly pursue the action or withdraw because of its conflict. Furthermore, FDIC's trial court counsel represented that these were "derivative claims" and prepared sketch orders calling Plaintiffs' claims derivative, absolutely refusing to honor Petitioners' "demands" due to its mistaken belief that §1821(d) created FDIC as a "sacred cow."

3. Section 3 of the Opposition purports to respond to pages 18 and 19 of the Petition which also includes the pages referenced in section 2 of the Opposition. Thus, section 2 of this Reply also responds to section 3 of the Opposition. However, a few points bear emphasis. First, the Opposition did not cite or respond to the cases and/or arguments of this section of the Petition (Pet. 16-22). Second, FDIC (Opp. 8) falsely alleges that the "acknowledged" conflict of interest finds no support in the record when the record is abundantly peppered with documentary evidence and uncontroverted affidavits quoting verbatim from transcripts of conversations with officers and counsel for FDIC, supporting the legal authority for and the factual basis of the conflict of interest. Third, noted supra, FDIC (Opp. 8) also alleges the absence of an unsuccessful demand after the Complaint was filed when the entire record supports and reflects that the trial

court and the parties always treated Petitioners' "demands" as an "unsuccessful demand." Accordingly, Petitioners correctly argue (Pet. 16-19) that the lower courts erred in permitting the wholesale substitution of FDIC as plaintiff with respect to the derivative claims.

4. Finally, FDIC disingenuously attempts to represent that the record below evidences that Anthony's only interest is a mere "contingency arrangement." In view of the record to the contrary, FDIC's current representations must be ignored. The record evidence is voluminous and uncontroverted, including multiple affidavits (JApp. C.A. 427-431; 434-438) that Anthony owned outright 30% of all the derivative and nonderivative claims and that he was assigned a 30% contingency fee interest to secure his receipt of any recovery from the First Virginia-defendants. Contrary to FDIC's view now, Anthony had a property interest in his own claims against the First Virginia-defendants and not on the claims of First Security, FDIC, or the Receivership Estate.

In any event, Anthony's interest in the outcome of the litigation cannot be seriously disputed because he holds both a contingent and an outright ownership interest in the derivative and nonderivative claims against the defendants. See Valley Ranch Dev. Co. v. FDIC, 960 F.2d 550 (5th Cir. 1992); Venegas v. Skaggs, 867 F.2d 527 (9th Cir. 1989). In Valley Ranch, a contingency fee contract alone constituted an "interest" permitting intervention. A fortiori, Anthony's outright ownership of 30% of the recovery is sufficient to constitute an "interest" for purposes of intervention. In Venegas, a plaintiff's former lawyer sought to intervene to confirm a lien for his fees, and the Court held that it was an abuse of discretion for the trial court to deny intervention while determining the merits of the contingency fee agreement.

Contrary to FDIC's view, the record evidence is that Anthony repeatedly made timely "administrative claims," but FDIC responded, in writing, that the non-quantifiable claim would have to be determined later. That date never came. The record, therefore, reflects that, even though Anthony's claim against the First Virginia-defendants (not FDIC or the Receivership Estate) was timely filed with FDIC, FDIC in effect requested an extension of time to ascertain the non-quantifiable amount of his claim.

Moreover, the law supports and the record shows, contrary to FDIC's view, that a claim against a third party, such as the First Virginia-defendants, does not have to be submitted through the "administrative claims" procedure of FDIC. FDIC's reliance on RTC v. Elman, 949 F.2d 624 (2d Cir. 1991) is, therefore, misplaced, even if Anthony had not timely filed his "contingent" claim with FDIC.

Further, FDIC's reliance on Elman, supra; Fary v. Aquino, 241 S.E.2d 799 (Va. 1978); Heinzman v. Fine, Fine, Legum & Fine, 234 S.E.2d 282 (Va. 1977); and FDIC v. Shain, Schaffer & Ratanello, 944 F.2d 129 (3rd Cir. 1991) is misplaced. First, none of these cases involve an attorney's outright, non-contingent, ownership interest in the cause of action. Second, none involve an attorney's right to intervene in order to monitor, prosecute, and protect his own interest. Third, Elman and Shain involve an attorney's retaining lien on a defunct bank's files. This appeal has absolutely nothing to do with a retaining lien on any files. Fourth, Fary and Heinzman, supra, hold that, even without an outright ownership interest, an attorney with a contingency fee arrangement owns a significant "interest." Fifth, Anthony's claims were not upon the files or other assets of FDIC's Receivership Estate, but upon his right to recover from a third party (the First Virginia-defendants). Sixth, Anthony had a right to intervene, pursuant to F.R.C.P. 24, without regard to whether he claimed a lien on the assets of FDIC or some third party.

CONCLUSION

For the reasons stated in the Petition for Certiorari and herein, this Court should--and the Petitioners request this Court to--issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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